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Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE EDWARD F. TAUMOEPEAU
and TALAHIVA I. TAUMOEPEAU,

Debtors.

BAP No. UT-05-102

EDWARD F. TAUMOEPEAU and
TALAHIVA I. TAUMOEPEAU,

Appellants,

Bankr. No. 03C-21814
Chapter 13

v.

ORDER AND JUDGMENT*

MANUFACTURERS & TRADERS
TRUST COMPANY, AS TRUSTEE
and J. VINCENT CAMERON, Chapter
13 Trustee,

Appellees.

Appeal from the United States Bankruptcy Court
for the District of Utah

Before MICHAEL, McNIFF, and JACKSON¹, Bankruptcy Judges.

McNIFF, Bankruptcy Judge.

Edward F. Taumoepeau and Talahiva I. Taumoepeau (“Debtors”) appeal the bankruptcy court’s Order (“Order”) denying the Debtors’ Motion for Reconsideration and for Relief from Order & Motion for Contempt Sanctions

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

¹ Honorable Niles L. Jackson, United States Bankruptcy Judge, United States Bankruptcy Court for the Western District of Oklahoma, sitting by designation.

Against Respondents (“Motion for Reconsideration”) entered September 29, 2005. We affirm.¹

I. Background

The Debtors filed a Chapter 13 petition on February 3, 2003, and a Chapter 13 plan on February 5, 2003. By June 2003, the Debtors were five months in arrears on the postpetition payments owed to Fairbanks Capital Corporation (“Fairbanks”), a secured creditor holding a Trust Deed on the Debtors’ residence. On June 27, 2003, the parties executed a Stipulation to Cure Post-Petition Arrearage (“Stipulation”) later approved by the bankruptcy court. The Stipulation provided for a lump-sum payment and for six monthly payments of \$301.00 to bring the postpetition payments current. In the event of default, the Stipulation provided for an *ex parte* order terminating the automatic stay and permitting Fairbanks to foreclose its security interest.

The Debtors filed a First Modification of Chapter 13 Plan on July 18, 2003. The modification and the February 5, 2003, plan collectively became the Debtors’ Chapter 13 plan (“Modified Plan”). The Modified Plan proposed to cure a prepetition arrearage owed to Fairbanks under the Trust Deed. The Debtors’ disposable income set forth on Schedule J was based on a budget that included the payment to cure the postpetition arrearage under the Stipulation. However, the Modified Plan did not address the postpetition arrearage or the Stipulation.

On September 15, 2003, the bankruptcy court held a hearing on the objection filed by the standing Chapter 13 trustee, Vince Cameron, to confirmation of the Modified Plan. At the hearing, the Debtors’ counsel represented to the bankruptcy court that the Debtors’ Modified Plan contained a provision to cure the arrearage owed to Fairbanks as claimed in Fairbanks’ proof

¹ The filing precedes the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”); all references to the Bankruptcy Code are pre-BAPCPA.

of claim. The arrearage claimed by Fairbanks in the proof of claim was the prepetition arrearage.

The Debtors defaulted under the terms of the Stipulation. After providing the agreed notice to the Debtors, Fairbanks filed its Affidavit of default in support of its Motion for Relief from Stay. The Debtors did not object or otherwise respond. On September 30, 2003, the bankruptcy court entered an Order Terminating Automatic Stay (“Stay Order”). The Stay Order granted Fairbanks relief to foreclose its security interest in the Debtors’ residence. Fairbanks held a public sale on November 26, 2003, purchased the property at the sale, and transferred title to the beneficiary of the Trust Deed, Appellee Manufacturers & Traders Trust Company (“Manufacturers”).

On November 13, 2003, the bankruptcy court confirmed the Modified Plan. The Confirmation Order related back to September 5, 2003, and did not address the postpetition arrearage, the Stipulation or the Stay Order.

When Manufacturers attempted to repossess the residence, the Debtors filed a Motion for Injunctive Relief and Contempt Order against Fairbanks and Manufacturers in the bankruptcy court. The Debtors argued, among other things, that the Stay Order did not survive confirmation of the Modified Plan, the foreclosure sale was in violation of the automatic stay, and the Debtors were entitled to damages for the alleged stay violation. Manufacturers filed a response and a Motion to Annul or Terminate the Automatic Stay.

The bankruptcy court held a hearing on the motions on June 24, 2005. Relying on the decision of the Court of Appeals for the Tenth Circuit in *Andersen v. UNIPAC-NEBHELP (In re Andersen)*, 179 F.3d 1253 (10th Cir. 1999), the bankruptcy court ruled on the record that the matters in issue were not litigated at the confirmation hearing, and that the Stay Order was *res judicata*. The bankruptcy court entered a formal order on July 26, 2005.

The Debtors filed the Motion for Reconsideration, and the bankruptcy court

held another hearing. On September 29, 2005, the bankruptcy court entered the Order denying the Motion for Reconsideration, and this appeal followed.

II. Jurisdiction and Standard of Review

The Debtors timely appealed the bankruptcy court's Order. Fed. R. Bankr. P. 8002(a). This Court, with the consent of the parties, has jurisdiction to hear appeals from final judgments, orders, and decrees of bankruptcy courts within the Tenth Circuit. 28 U.S.C. § 158(a)(1) and (b)(1). The parties have consented to this Court's jurisdiction because neither party has elected to have the appeal heard by the United States District Court for the District of Utah. 28 U.S.C. § 158(c)(1); Fed. R. Bankr. P. 8001(e). A determination that an order is *res judicata* is a question of law reviewed *de novo*. *Plotner v. AT & T Corp.*, 224 F.3d 1161, 1168 (10th Cir. 2000).

III. Discussion

The issue is whether the Confirmation Order supersedes the Stay Order or, inversely, whether the Stay Order survived confirmation of the plan. In the case of *In re Talbot*, 124 F.3d 1201, 1209 (10th Cir. 1997), the Tenth Circuit quoted *Collier on Bankruptcy* as follows: “the order confirming a chapter 13 plan represents a binding determination of the rights and liabilities of the parties as ordained by the plan.” Absent timely appeal, the confirmed plan is *res judicata* and its terms are not subject to collateral attack, and creditors “may not take actions to collect debts that are inconsistent with the method of payment provided for in the plan.” *Id.* (quoting 8 *Collier on Bankruptcy* ¶ 1327.02[1] (Lawrence P. King ed., 15th ed. 1996)).

In the *Andersen* case, the court cited the *Talbot* case and ruled that a Chapter 13 plan confirmation order is *res judicata* as to the matters actually litigated or necessarily determined by the confirmation order. *In re Andersen*, 179 F.3d at 1258-1259. Based on the *Andersen* ruling, the bankruptcy court concluded that the Confirmation Order had nothing to do with the Stay Order and

hence, there could be no violation of the automatic stay. Appellants' Appendix, at AA134.

The bankruptcy court correctly determined that the issue of the postpetition default in the Trust Deed payments was not litigated at the confirmation hearing and was not addressed by the Modified Plan or the Confirmation Order. That undisputed fact distinguishes this case from those cited by the Debtors, specifically, *Diviney v. Nationsbank (In re Diviney)*, 211 B.R. 951 (Bankr. N.D. Okla. 1997), *aff'd*, 225 B.R. 762 (10th Cir. BAP 1998) (confirmed plan treated creditor's claim and claim was paid - collection action violated the automatic stay) and *Green Tree Financial Corp. v. Garrett (In re Garrett)*, 185 B.R. 620 (Bankr. N.D. Ala. 1995) (arrearage treated in plan and therefore, confirmed plan superseded stay relief order).

Here, the Modified Plan did not include a provision addressing the postpetition default. To the contrary, the Debtors were acting in reliance on the Stipulation when they included the agreed payment in their Schedule J expenses. The postpetition default issue was not addressed or litigated during the confirmation process. Therefore, the Confirmation Order and the Modified Plan did not affect the validity of the Stay Order.

Regardless, the Debtors argue that the Stay Order became void as a result of confirmation. The argument fails. At no time did the Debtors appeal the Stay Order, attempt to have the Stay Order vacated, or include language in the Modified Plan to void the Stay Order. The Confirmation Order simply had no effect on the validity of the Stay Order.

The Debtors also contend: Fairbanks did not alert the Debtors at the confirmation hearing that it intended to enforce the Stipulation; that failure deprived the Debtors of procedural due process; therefore, Fairbanks did not have standing to obtain the Stay Order; and consequently, the bankruptcy court was without jurisdiction to enter the Stay Order. A variation on the argument asserts

that because Fairbanks accepted the Modified Plan, it had no injury in fact, and no standing to request the Stay Order. These arguments ignore the sequence of events. More fatal, however, is the Debtors' failure to timely appeal the Stay Order. The Debtors cannot argue in this appeal that the Stay Order was entered without subject matter jurisdiction.

The Debtors' remaining argument is that when confirmation of the Modified Plan revested the residence in the Debtors, the Modified Plan nullified the Stay Order. The argument is nonsensical and has no bearing on the result in this case.

IV. Conclusion

Because the Stay Order was valid, Fairbanks's conduct could not have been in violation of the automatic stay imposed under 11 U.S.C. § 362(a). The decision of the bankruptcy court is affirmed.